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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. _____

IN RE: ESTATE OF
MAXINE C. ROGERS, Deceased

PETITION FOR WRIT OF CERTIORARI
To the District Court of Appeal of the State of Florida in and for the Second District

The petitioners pray that a writ of certiorari issue to review the final judgment of the District Court of Appeal of The State of Florida In and For The Second District rendered on the 23rd day of June, 1972. Because the Supreme Court of The State of Florida declined to entertain the Petitioners' petition for writ of certiorari to that Court on the 19th day of September, 1972. The last Court to hear this case on its merits was the District Court of Appeal of The State of Florida In and For The Second District.

OPINION BELOW

There was no opinion issued by the Supreme Court of Florida, simply a denial of the writ of certiorari. There was no opinion issued by the District Court of Appeal of The State of Florida In and For The Second District except for a per curiam denial of the appeal. There was no reporting of the decision of the County Judge's Court. However, the Court issued a ruling a copy of which is set forth in Appendix "A," *infra*, pages 12 to 16.

JURISDICTION

On the 19th day of September, 1972 the Supreme Court of the State of Florida denied a petition for writ of certiorari directed to the District Court of Appeal of the State of Florida in and for the Second District directing said court of appeal to certify its record and dismiss the appeal from that court on the basis that court was without jurisdiction to hear this cause see Appendix "B," *infra*, page 17. No application for rehearing was filed in this matter.

Jurisdiction of this court is based upon the following:

1. An adjudication was made by the County Court In and For Pinellas County, Florida depriving Jay S. Rogers of approximately One Hundred Eighty Thousand ($180,000.00) Dollars worth of assets of the estate of Maxine C. Rogers at a time when Jay S. Rogers had been duly adjudicated incompetent and was not represented at the trial which determined the ultimate beneficiary of the assets and was without power to introduce all of the reasonably available relevant evidence.

2. The County Court of Pinellas County, Florida denied a petition filed by a newly appointed guardian ad litem on the Court's own motion without a hearing and without any contravening evidence, even though the petition stated facts which if proved would be clear grounds for a rehearing of the only contested issue before the Court.

3. Jay S. Rogers was deprived of a substantial amount of property in violation of the due process clause of the 14th Amendment of the U.S. Constitution and contrary to the decisions of this court.

Date of the Judgment Sought to be Reviewed

This writ of certiorari is directed to the District Court of Appeals for the State of Florida, Second District, being the last Court to pass on the issues and merits of the case.

The final judgment of the District Court of Appeals of the State of Florida in and for the Second District was rendered on the 23rd day of June, 1972 and was a per curiam decision without opinion. See Appendix "C," *infra*, page 18.

There have been no orders respecting any rehearing filed in this cause and no order granting an extension of time within which to petition for certiorari.

Statutory Provision Believed to Confer on This Court Jurisdiction to Review the Judgment or Decree in Question by Writ of Certiorari

Title 28, Section 2101, subparagraph (c) provides for a writ of certiorari in a civil action to be brought before the Supreme Court within ninety days after the entry of such judgment or decree. See Appendix "D," *infra*, pages 19 to 20.

Rule 19, Paragraph 1., sub-paragraphs (a) and (b), United States Supreme Court Rules:

> "1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:
>
> (a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court.

(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or his decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

2. * * * (not applicable)

QUESTIONS PRESENTED FOR REVIEW

1. Does the due process clause of the 14th Amendment of the United States Constitution require a duly adjudicated incompetent heir of a substantial intestate estate to have a guardian or guardian ad litem upon whom process of service and notices can be served before a Court can deprive him of his property?

2. Does the due process clause of the 14th Amendment of the United States Constitution require a duly adjudicated incompetent heir of a substantial intestate estate to have a guardian or guardian ad litem appointed before the incompetent's rights in the estate can be taken from him at a trial of the sole controlling issue?

3. Has the due process clause of the 14th Amendment of the United States Constitution been violated where an administrator of an estate acts as an attorney for the estate, as an attorney for one of the contesting parties to the determination of heirship and as one of the principal witness at the trial of the controlling issue for the determination of heirship?

4. Is it a denial of due process for a trial court to rule against a petition requesting the rehearing by a newly appointed guardian ad litem approved by the court after the trial where the court acts on its own motion without any hearing and where the petition is completely uncontroverted in any respect?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

The constitutional provisions involved are contained in Article XIV, Section 1 of the Amendments to the Constitution of the United States, which is as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Included in the Appendix hereto are the following:

United States Code, Title 28, Section 2101 (Appendix D, *infra*, pages 19 and 20);

The Code of Professional Responsibility of the Florida Bar Association, Canon 4, EC 4-5 and Canon 5, EC 5-9, EC 5-10 and EC 5-15 (Appendix G, *infra*, pages 27 to 29);

Florida Statutes 732.54 (Appendix H, *infra*, page 29).

STATEMENT OF CASE

Maxine C. Rogers, a Florida domicile, died intestate in the State of Florida owning real property in the State of Florida consisting of an operating motel having an approximate value of $180,000.00. Her surviving parents were her statutory heirs under the decedent and distribution provisions of the Florida statutes.

A surviving sister, Mervyn Rogers Penn, applied for and was granted Letters of Administration. The decedent's former husband, Robert F. Hale, whom the decedent had divorced in the State of Ohio, then petitioned the Court to revoke the Letters of Administration for the reason that he was the common-law husband of the decedent and was sole heir at law.

During the pendency of Robert F. Hale's petition the Administratrix died and her attorney, Charles W. Burke, was appointed as Administrator de bonis nom. The decedent's mother, Hazel Huff Rogers, died, a domicile of the State of Ohio, and the decedent's father, Jay S. Rogers, was, on the 29th day of June, 1971, declared to be an incompetent person pursuant to a hearing held on May 4, 1971 based upon an application filed on April 7, 1971. A report of the referee and the order of the Court is attached as Appendix "E," *infra*, pages 21 to 23.

A pretrial conference was held by the County Judge of Pinellas County, Florida on May 5, 1971 and the actual trial for determination of heirship was held on May 11, 12, 13 and 14, 1971.

At the trial Robert F. Hale was represented by legal counsel. Charles W. Burke appeared as administrator d.b.n. and attorney for the estate of Maxine C. Rogers, deceased. Charles W. Burke also represented Gail Rogers, the executor of the estate of Hazel Huff Rogers, mother of the decedent.

Hazel Huff Rogers' entire estate had been bequeathed to Jay S. Rogers, husband of Hazel Huff Rogers and father of the decedent, Maxine C. Rogers.

At the start of the trial the Court found that the sole issue to be determined was whether or not, at the time of her death, the decedent, Maxine C. Rogers, was, in fact, the common-law wife of the petitioner, Robert F. Hale.

The record of the Court shows that the notice of the hearing was forwarded by regular mail to the incompetent, Jay S. Rogers, personally, to an incorrect address and to the executor of the decedent's mother, Gail Rogers, who had a nominal interest, if any, because the equitable title of all real estate had vested immediately in Jay S. Rogers at the time of the death of the mother, Hazel Huff Rogers. At the trial held on this matter, Charles W. Burke, who appeared as Administrator, d.b.n., as attorney for the estate and as the attorney for Gail Rogers, Executor of the estate of Hazel Huff Rogers, was called as a witness by the petitioner, Robert F. Hale, and his entire files were permitted by the Court to be examined by the petitioner. The incompetent, Jay S. Rogers, was never present at any of the proceedings.

On July 1, 1971, Byron Lind, the Ohio Guardian, filed a petition for the appointment of Byron Lind as Guardian Ad Litem, in Pinellas County, Florida, of Jay S. Rogers, Incompetent, and filed a petition in the County Judge's Court in and for Pinellas County, alleging Jay S. Rogers had been judicially determined to be non compos mentis by the Probate Court of Summit County, Ohio on May 4, 1971; that Jay S. Rogers was the sole devisee under the Will of Hazel Huff Rogers, his wife, and that her interest in any real estate did not need to be sold to pay debts of her estate; that Jay S. Rogers had been mentally incompetent since January or February, 1971, shortly after the death of his wife, Hazel Huff Rogers; that Jay S. Rog-

ers was not represented at the pretrial or trial by a guardian or a guardian ad litem and did not have any legal guardian appointed until Byron Lind qualified in that capacity on June 29, 1971; that the judgment of the County Court of Pinellas County finding that Robert F. Hale was the surviving common-law husband deprived Jay S. Rogers of property of the estate without due process as provided by the 14th Amendment of the United States Constitution; that circumstantial and pursuasive evidence was available that Robert F. Hale was not the common-law husband of the decedent and requesting that the judgment finding Robert F. Hale the common-law husband of Maxine C. Rogers be vacated, set aside and adjudged to be of no force and effect (see Appendix "F," *infra*, for copy of Petition, pages 24 to 26).

The County Judge, David Seth Walker, accepted the appointment of Byron Lind as Guardian Ad Litem and then immediately denied on the Court's own motion, the request for rehearing and setting aside the judgment finding Robert F. Hale to be the common-law husband without hearing, presentation of evidence or any contravention of the petition filed by Byron Lind.

This matter was then appealed to the District Court of Appeals of the State of Florida In and For The Second District who denied the appeal in a per curiam decision rendered on the 23rd day of June, 1972 without opinion. The petitioners, Gail Rogers, as Executor of the Estate of Hazel Huff Rogers and Byron Lind, as guardian ad litem for Jay S. Rogers, petitioned the Supreme Court of the State of Florida for a writ of certiorari directed to the District Court of Appeals for the State of Florida In and For the Second District. This petition was denied on the 19th day of September, 1972.

The petitioners then attained a stay from the County Judge's Court in and for Pinellas County until the 24th

day of November, 1972, pending a filing of a writ of certiorari to the United States Supreme Court directed to the District Court of Appeal in and for the State of Florida, Second District. The question of constitutional rights was first raised in the petition filed by Byron Lind for rehearing of the issue and trial of the determination of the common-law husband. See Appendix "F," *infra*, pages 24 to 26.

ARGUMENT.

The petitioners in this case submit to the court that the questions raised by this case have not previously been decided by this court. This Court has a recent trend in its decisions to be particularly alert to the individuals constitutional rights. This has been most evident in the last three or four years in the criminal law field, in establishing and protecting the constitutional rights of minors, in protecting the rights of minority groups involving race, religion and political beliefs. During this same time and even prior to the recent trend of cases there have been extremely few decisions that dealt with the rights of mentally incompetent persons. This field clearly needs a concise settlement of constitutional rights available to the category of individuals.

Rarely are there sufficient assets and financial ability to submit a question of the rights of mentally incompetent persons before this court. However, in this case the issue has been clearly and concisely raised as to the rights of an incompetent to have a guardian or guardian ad litem appointed and acting in the incompetent's behalf able to secure legal counsel of his choice as a prerequisite to having a determination by a court that his apparent statutory rights as an heir at law of a decedent are invalid and void because of the appearance of one claiming to be the common-law husband of the decedent.

The issue was further aggravated by the fact situation that the well meaning counsel acting as the administrator of the estate was placed in a position contrary to the Canons of Ethics of the Florida Bar Association, (Appendix "G," *infra*, pages 27 to 29) of being administrator de bonis non thereby theoretically representing all heirs and all claimed heirs; in addition to being the attorney for the administrator, therefore himself; being the attorney for Gail Rogers as executor of the estate of Hazel Huff Rogers, one of the contesting parties and then being called as the principal witness whose files contained the evidence that contributed substantially to the defeating of the rights of the incompetent Jay S. Rogers. No other attorney was called in when the administrator, d.b.n. was on the witness stand as a witness. Further there were indications of the knowledge of all parties prior to trial that Jay S. Rogers was an incompetent. A notice was served on Gail Rogers as guardian of Jay S. Rogers, an incompetent prior to the trial even though Gail Rogers had never been appointed guardian of Jay S. Rogers by any court.

At the actual trial of the case Jay S. Rogers was not in fact represented even though there is some indication of evidence that he may have authorized Charles W. Burke to act as a legal counsel either prior to or subsequent to becoming an incompetent.

Florida Statute 732.54 reads in part "the county judge shall, without notice, appoint a guardian ad litem to represent any infant or person non compos mentis where there is no legal guardian appointed or qualified in this state, or where such guardian is interested in his own right, and to represent any unknown person interest in the estate." For complete Statute see Appendix "H," *infra*, page 29.

Jay S. Rogers as the sole beneficiary under the estate of Hazel Huff Rogers, was the sole heir at law of Maxine

C. Rogers, the decedent, if there had been no finding of a common-law husband.

The Incompetent's interests were not represented as required by Florida law and even if they had been represented by the administrator, Charles W. Burke, that representation would have not met the due process clause of the 14th Amendment of the United States Constitution. The various categories of representation by Charles W. Burke as the administrator, as the principal witness in the case, and as attorney for one of the contesting parties would have created such a conflict of interests to inadequately protect the incompetent's rights.

The action of the county judge in refusing to grant a rehearing and vacation of its previous order where a newly appointed guardian ad litem represented the sole apparent heir of a substantial estate and to make that refusal in spite of a petition setting forth facts which if proved would be a clear denial of constitutional rights and for the court to make its decision on its own motion with no contravention of the claims, alleged in the petition, would appear to the petitioners to be a clear violation of the judicial rights and again the taking of property without the due process of law.

The petitioners respectfully submit to this court that the issues in this case are clear and concise and involve substantial constitutional rights of great interest to the public at large. Further there are no definitive decisions by this court on the issues herein being presented.

Respectfully submitted,

WARREN W. GIBSON
RAYMOND GRAHAM
Attorneys for Petitioners

APPENDIX A

Ruling by County Judge, Pinellas County, Florida

(May 27, 1971)

Probate No. 61,962

IN THE COUNTY JUDGE'S COURT
IN AND FOR PINELLAS COUNTY, FLORIDA

IN RE: ESTATE OF
MAXINE C. ROGERS, DECEASED

RULING OF COURT

This cause came on to be heard the 27 day of May, 1971, before the Honorable David Seth Walker, Judge of said Court, in Chambers, Judicial Building, St. Petersburg, Pinellas County, Florida, when and where the Court made its ruling as follows:

The Court: I hereby direct that the following remarks of the Court be transcribed and filed.

This cause came on to be heard during the afternoon hours of Tuesday, May 11, 1971, Wednesday, May 12, 1971, Thursday, May 13, 1971, and Friday, May 14, 1971 on the petitioner's amended motion for revocation and granting of letters of administration.

During that period this Court heard and duly considered the testimony, both in person and by deposition, of the many witnesses on behalf of the petitioner and respondent. This Court also examined and duly considered all of the items of documentary evidence admitted on those days.

Further, during the period of trial, this Court was called upon to make numerous rulings as to the admissibility of testimony, both oral and by deposition, and as to

the admissibility of many items of documentary evidence as were offered by both petitioner and respondents.

In several instances testimony and items of documentary evidence which were excluded by ruling of the Court were allowed to be proffered in their entirety so as to show their contents and import. This was allowed by the Court in an effort to fairly and equitably facilitate the matter of appeal should any be taken.

The findings, judgments and orders of this Court which we will make known today are of course based solely upon the testimony and the documents which were formally admitted into evidence, either by stipulation of counsel or by ruling of this Court.

At this time it is proper to note, remember and record that the single issue on trial which this Court was called upon to decide was whether or not at the time of her death on the thirty-first day of March, 1970, the decedent Maxine C. Rogers was in fact the common law wife of petitioner Robert F. Hale. This question was defined and accepted as the only issue in controversy at the pre-trial conference had and recorded on Wednesday, May 5, 1971, although the vehicle upon which this question approached the Court was the aforementioned amended petition for revocation and granting of letters testamentary.

The Court will at this time specifically confine itself and its remarks to the single issue as was stipulated at pre-trial conference.

This Court finds that the decedent Maxine C. Rogers and the petitioner Robert F. Hale were at one time formally joined together as man and wife. This union was dissolved by legal divorce by order of the Court of Common Pleas, Domestic Relations Division of Stark County, State of Ohio, on December 11, 1941.

Subsequently the decedent was married to one, Frank A. Stohlman. This marriage was terminated by legal divorce by order of the Court of Common Pleas of Cuyahoga County, State of Ohio, on November 26, 1946.

It was shown and proven that thereafter, during the early years of the decade 1950, the decedent and the petitioner resumed cohabitation. It is apparent that they, the decedent and the petitioner, then continued to reside and cohabit for a number of years primarily in the City of Cleveland, Cuyahoga County, Ohio.

It is also apparent that the decedent and the petitioner jointly, actively and openly engaged in a business venture begun in the early years of the decade 1950 and continuing for a number of years thereafter.

For many consecutive years during the period of their resumed cohabitation and active joint business association and thereafter, the decedent and the petitioner reported and filed joint internal revenue service income tax forms, copies of which are of record herein, which on their face indicated a relationship of man and wife as between themselves.

It is further apparent from the testimony before this Court that at least during the period of their cohabitation and their business venture together in the City of Cleveland, Cuyahoga County, Ohio, during the decade 1950, the decedent and the petitioner were considered by their family, their associates, their acquaintances and their community to be husband and wife.

Subsequently the decedent in the decade 1960 did move herself to Pinellas County, Florida, wherein the record shows that she resided alone and proceeded to engage in several real estate and business ventures alone and by herself, and with co-partners and associates other than the petitioner Robert F. Hale.

This appears to have been the domicilary and busi-

ness circumstance of the decedent Maxine C. Rogers at the date and time of her death.

We do not know nor can be presume to know the motives of the decedent. All of the evidence before the Court indicates that Maxine C. Rogers was an aggressive, astute and successful business woman. We do not know whether the decedent considered her relationship with the petitioner Robert F. Hale to be one of finances or one of family; however it appears that the former at least in her own mind prevailed.

It is apparent from the record that the decedent was able in her own mind to slip from the status of being married to that of being single in accordance with the needs and circumstance of any given moment. In fact the decedent; as the evidence shows, signed and acknowledged under oath on May 20, 1969 a denial of any matrimonial or business relationship with the petitioner. This was done as a response to a complaint for divorce brought by the petitioner and directed to the Court of Common Pleas of Cuyahoga County, State of Ohio. However, final judgment in that cause was apparently never rendered.

Fortunately or unfortunately, as the case may be, unlike the decedent this Court cannot summarily dismiss or disregard the apparent facts and circumstances which were proven to have occurred in the decade 1950.

This Court finally was greatly impressed by the testimony under cross-examination of the respondent's own witness, Ardene Lind, the sister of the decedent, who affirmed that her own children considered and referred to the petitioner as "Uncle Bob." This testimony in effect iced the cake.

It is apparent to this Court from everything we have seen and from everything we have heard that as required by the substantive laws of the State of Ohio, all of the elements of a common law marriage between the decedent

Maxine C. Rogers and the petitioner Robert F. Hale have been conclusively shown.

There being proven before and to this Court the presence of a valid common law marriage by and between the decedent Maxine C. Rogers and the petitioner Robert F. Hale, and there being shown to be no legal dissolution of this union, it is therefore hereby ordered and adjudged that Maxine C. Rogers on the date and time of her death was in fact the common law wife of Robert F. Hale.

Mr. Robinson, you are hereby directed to prepare an order for my signature in specific accordance herewith.

Thank you, gentlemen.

APPENDIX B

Decision of the Supreme Court of Florida

(September 19, 1972)

Case No. 42,556

IN THE SUPREME COURT OF FLORIDA

BYRON LIND,

Guardian ad litem of JAY S. ROGERS, Incompetent,

Petitioner,

vs.

ROBERT F. HALE,

Respondent

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari, jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Florida Appellate Rule 4.5 c (6), and it appearing to the Court that it is without jurisdiction, it is ordered that the Petition for Writ of Certiorari be and the same is hereby denied.

ROBERTS, C.J., ERVIN, CARLTON, ADKINS and DEKLE, JJ., concur.

APPENDIX C

Decision of Court of Appeals, Second District of Florida

(June 23, 1972)

Case No. 71-520

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA, SECOND DISTRICT

IN RE: ESTATE OF MAXINE C. ROGERS, DECEASED.

GAIL ROGERS,
Executor of HAZEL HUFF ROGERS and BYRON LIND as the Ohio Guardian and the Guardian Ad Litem of JAY S. ROGERS, incompetent,

Appellants,

v.

ROBERT F. HALE,
Appellee.

Appeal from the County Judge's Court for Pinellas County; David S. Walker, Judge.

PER CURIAM.

Affirmed.

LILES, *A. C. J.*, McNULTY, *J.*, and DAYTON, ORVILLE L., JR., (Ret), *Associate Judge*, Concur.

APPENDIX D

Title 28, Section 2101 of the United States Code

SUPREME COURT; TIME FOR APPEAL OR CERTIORARI; DOCKETING; STAY

(a) A direct appeal to the Supreme Court from any decision under sections 1252, 1253 and 2282 of this title, holding unconstitutional in whole or in part, any Act of Congress, shall be taken within thirty days after they entry of the interlocutory or final order, judgment or decree. The record shall be made up and the case docketed within sixty days from the time such appeal is taken under rules prescribed by the Supreme Court.

(b) Any other direct appeal to the Supreme Court which is authorized by law, from a decision of a district court in any civil action, suit or proceedings, shall be taken within thirty days from the judgment, order or decree, appealed from, if interlocutory, and within sixty days if final.

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

(d) The time for appeal or application for a writ of certiorari to review the judgment of a State court in a criminal case shall be as prescribed by rules of the Supreme Court.

(e) An application to the Supreme Court for a writ of certiorari to review a case before judgment has

been rendered in the court of appeals may be made at any time before judgment.

(f) In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court. The stay may be granted by a judge of the court rendering the judgment or decree or by a justice of the Supreme Court, and may be conditioned on the giving of security, approved by such judge or justice, that if the aggrieved party fails to make application for such writ within the period allotted therefor, or fails to obtain an order granting his application, or fails to make his plea good in the Supreme Court, he shall answer for all damages and costs which the other party may sustain by reason of the stay. June 25, 1948, c. 646, 62 Stat. 961; May 24, 1949, c. 139, 106, 63 Stat. 104,

APPENDIX E-1

Report of Referee, Summit County, Ohio

Case No. 44-34203-141

IN THE COURT OF COMMON PLEAS
PROBATE DIVISION

STATE OF OHIO, SUMMIT COUNTY, SS.

IN THE MATTER OF THE GUARDIANSHIP OF
JAY S. ROGERS, Incompetent.

REPORT OF REFEREE

This cause came on to be heard before Ralph C. Young, General Referee, Probate Court, Summit County, Ohio, serving in such capacity under authority of Section 2315.37 Revised Code of Ohio, upon the Motions to vacate part of the Judgment Entry dated June 29, 1971, and the vacation of the appointment of Byron D. Lind as such Guardian. Said Motions were filed by Robert F. Hale who was at one time the husband of a predeceased daughter and son-in-law of said Ward.

Examination of the records indicate that on April 7, 1971, the First National Bank of Akron filed an application in this Court for the appointment of itself or some other suitable person as Guardian of Jay S. Rogers, age 82, a resident of Cuyahoga Falls, Ohio. The Three (3) day notice was served upon the Ward and his son and daughter, they being the only next of kin in this area.

After the hearing scheduled for April 16, 1971, was continued, a hearing May 4, 1971, was had with all the next of kin, the Ward, his counsel, Mr. Robert McDowall, and Ward W. Davis, counsel for the next of kin present. Upon the medical statement of R. A. Breckenridge, M.D.,

the testimony of counsel for Jay S. Rogers and the son and daughter as to the general condition of Ward—confused, disoriented state of mind—it was found that the appointment of a legal guardian was necessary for the best interest of the Ward and his estate; that by agreement of all, the First National Bank would withdraw and that a member of the Ward's family should be appointed as Guardian of the person and estate of said Jay S. Rogers by reason of advanced age, physical and mental disability. A Judgment Entry substantiating same was submitted and approved by all counsel involved and Byron D. Lind was appointed Guardian June 29, 1971, upon submitting his application and bond.

It is the conclusion and recommendation of this Referee that the Motions of Robert F. Hale be overruled for the reason that all statutory requirements as to the appointment of a legal guardian for the said Jay S. Rogers have been complied with.

Respectfully submitted,

/s/ RALPH C. YOUNG
Referee

The foregoing report of the Referee is hereby approved. Judgment Order to be prepared by Counsel for Guardian with Exceptions granted to Robert F. Hale.

/s/ NATHAN KOPLIN
Probate Judge

APPENDIX E-2

Order of Probate Court, Summit County, Ohio

(June 29, 1972)

Case No. 34203

COURT OF COMMON PLEAS, PROBATE DIVISION

THE STATE OF OHIO, SUMMIT COUNTY

IN THE MATTER OF THE GUARDIANSHIP OF
JAY S. ROGERS

JOURNAL ENTRY

This day this matter came on to be heard upon the application praying for the appointment of a guardian for the person and estate of Jay S. Rogers, a resident of Summit County, Ohio, on the ground that he is an incompetent person, and by reason of Advanced age, Physical and Mental disability is incapable of caring for his person and estate, and the same was submitted to the Court; on consideration whereof the Court finds that due notice of the filing of said application and of this hearing has been given to said Jay S. Rogers and all his next of kin resident of said County, as provided by law.

The Court further finds from the evidence that said Jay S. Rogers is an incompetent person, and by reason of Advanced age, mental and physical disability is incapable of caring for his person and estate, and that it is necessary to appoint a guardian for his person and property.

It is therefore by the Court ordered that a guardian be appointed for the person and estate of said Jay S. Rogers.

/s/ NATHAN KOPLIN
Probate Judge

APPENDIX F

Petition Filed by Byron Lind, Pinellas County, Florida

(July 1, 1971)

File No. 61-962

IN THE COUNTY JUDGE'S COURT IN AND FOR PINELLAS COUNTY, FLORIDA

IN RE: ESTATE OF
MAXINE C. ROGERS, Deceased

PETITION

Petitioners, Fail Rogers, Executor of Hazel Huff Rogers, deceased, and Byron Lind, Ohio Guardian and Guardian Ad Litem of Jay S. Rogers, incompetent, allege:

1. Jay S. Rogers and his wife, Hazel Huff Rogers, were the surviving parents of intestate decedent, Maxine C. Rogers, and were her sole heirs, she leaving no surviving husband or children;

2. At her death the decedent owned various Florida realty which need not be sold to defray debts or expenses of her estate.

3. During the administration of this estate Hazel Huff Rogers died testate in Ohio and Jay S. Rogers is the sole devisee under her will probated in Ohio of her interest in the Florida realty owned at death by the decedent in this cause. Her interest in the realty need not be sold to pay debts and expenses of her estate.

4. There is and has been no ancillary administration in Florida of the estate of Hazel Huff Rogers and her estate owes no debts or obligations in Florida which will render it necessary to sell her interest in the realty.

5. Thus, subject only to the rights of the Administrator of Maxine C. Rogers and the Executor of Hazel Huff Rogers to the use of said Florida realty for estate administration purposes, Jay S. Rogers it the sole heir to the fee simple title to the Florida realty owned by Maxine C. Rogers at her death.

6. On May 4, 1971, Jay S. Rogers was judicially determined to be non compos mentis by Probate Court of Summit County, Ohio, that being his domicile and on June 28, 1971, Byron Lind duly Qualified as Guardian of the person and property of the said Jay S. Rogers.

7. The said Jay S. Rogers has actually been non-compos mentis continously since about January or February, 1971, shortly after the death of his wife, Hazel Huff Rogers.

8. The said Jay S. Rogers was not represented at the pretrial or trial by a Guardian or Guardian Ad Litem and did not have a regular Guardian until Byron Lind qualified in that capacity on the 29th day of June, 1971.

9. The said Jay S. Rogers did not reside at 824 Falls Avenue, Cuyahoga Falls, Ohio at the time a copy of the notice of the Pretrial conference and final hearing is certified to have been furnished him at that address.

10. Being without a Guardian and Guardian Ad Litem the said Jay S. Rogers had no legal notice of the pretrial conference and final hearing and the notice having been furnished to an incorrect address he had no actual notice, his address at that time appearing of record in this cause as 10462 Page Road, Streetsboro, Ohio.

11. Therefore, the said Jay S. Rogers was mentally incompetent and not represented by a Guardian or Guardian Ad Litem at each and all of the hearings of this cause at the pretrial conference and final hearings.

12. The ultimate judgment of this Court from and upon the pretrial conference and final hearing was that

Robert F. Hale is the surviving common law husband of the intestate decedent, thus defeating the claim and right of the said Jay S. Rogers to an undivided one-half of the estate.

13. The judgment thus deprived the incompetent Jay S. Rogers of property without due process as guaranteed by the 14th Amendment of the United States Constitution.

14. The evidence presented at the hearing did not include the following public records, each of which would reflect the marital status of the said Robert F. Hale to-wit: city directory; drivers license application; city tax return; credit card application; bank records; voter registration; and arrest records.

15. The Guardian, Byron Lind, believes and avers that if such public records had been fully explored, procured and presented, they would have revealed and presented substantial and pursuasive evidence that Robert F. Hale was not the common law husband of the decedent.

16. The judgment holding Robert F. Hale to be the common law husband of the deceased is thus void or voidable for the reasons above advanced.

WHEREFORE, the Petitioners respectfully request that the Judgment entered in this cause on January 7, 1971 and holding Robert F. Hale to be the common law husband of Maxine C. Rogers be vacated, set aside and adjudged to be of no force and effect.

This the 1st day of July, 1971.

/s/ WARREN W. GIBSON

GRAHAM & GIBSON
800 S. Orange Avenue
Sarasota, Florida

Attorneys for Petitioners

APPENDIX G

The Code of Professional Responsibility of the Florida Bar Association

The Code of Ethics, and particularly the Code of Professional Responsibility of the Florida Bar Association under Canon 4, EC 4-5 reads:

"A lawyer should not use information acquired in the course of the representation of a client to the disadvantage of the client and a lawyer should not use, except with the consent of his client after full disclosure, such information for his own purposes. Likewise, a lawyer should be diligent in his efforts to prevent the misuse of such information by his employees and associates. Care should be exercised by a lawyer to prevent the disclosure of the confidences and secrets of one client to another, and no employment should be accepted that might require such disclosure."

Canon 5, particularly EC 5-9 and EC 5-10 reads:

"EC 5-9—Occasionally a lawyer is called upon to decide in a particular case whether he will be a witness or an advocate. If a lawyer is both counsel and witness, he becomes more easily inpeachable for interest and thus may be a less effective witness. Conversely, the opposing counsel may be handicapped in challenging the credibility of the lawyer when the lawyer also appears as an advocate in the case. An advocate who becomes a witness is in the unseemly and ineffective position of arguing his own credibility. The roles of an advocate and of a witness are inconsistent; the function of an advocate is to advance or argue the cause of another, while that of a witness is to state facts objectively.

EC 5-10—Problems incident to the lawyer-witness relationship arise at different stages; they relate either to whether a lawyer should accept employment or should withdraw from employment. Regardless

of when the problem arises, his decision is to be governed by the same basic considerations. It is not objectionable for a lawyer who is a potential witness to be an advocate if it is unlikely that he will be called as a witness because his testimony would be merely cumulative or if his testimony will relate only to an uncontested issue. In the exceptional situation where it will be manifestly unfair to the client for the lawyer to refuse employment or to withdraw when he will likely be a witness on a contested issue, he may serve as an advocate even though he may be a witness. In making such decision he should determine the personal or financial sacrifice of the client that may result from his refusal of employment or withdrawal therefrom, the materiality of his testimony, and the effectiveness of his representation in view of his personal involvement. In weighing these factors, it should be clear that refusal or withdrawal will impose an unreasonable hardship upon the client before the lawyer accepts or continues the employment. Where the question arises, doubts should be resolved in favor of the lawyer testifying and against the becoming or continuing as an advocate."

and EC 5-15 which reads:

"If a lawyer is requested to undertake or to continue representation of multiple clients having potentially differing interests, he must weigh carefully the possibility that his judgment may be impaired, or his loyalty divided if he accepts or continues the employment. He should resolve all doubts against the propriety of the representation. A lawyer should never represent in litigation multiple clients with differing interest; and there are few situations in which he would be justified in representing in litigation multiple clients with potentially differing interests. If a lawyer accepted such employment and the interests did become actually differing he would have to withdraw from employment with likelihood of resulting hardship on the clients; and for this reason it is preferable that he refuse the employment initially. On

the other hand, there are many instances in which a lawyer may properly serve multiple clients having potentially differing interest in matters not involving litigation. If the interests vary only slightly, it is generally likely that the lawyer will not be subjected to an adverse influence and that he can retain his independent judgment on behalf of each client; and if the interests become differing, withdrawal is less likely to have a disruptive effect upon the causes of his clients."

APPENDIX H

Florida Statutes 732.54

Whenever a legal guardian is appointed or qualified in this state for any infant or person non compos mentis who is interested in the estate of a decedent, such guardian shall represent his ward in all proceedings affecting such estate in the county judge's court, except as to proceedings in which the guardian is interested in his own right. The county judge shall, without notice, appoint a guardian ad litem to represent any infant or person non compos mentis where there is no legal guardian appointed or qualified in this state, or where such guardian is interested in his own right, and to represent any unknown person interested in the estate. A guardian ad litem shall, upon appointment, make and file an oath to discharge his duties faithfully. Whenever a guardian ad litem is appointed, no process need be served upon him, but he shall appear and defend as directed by the county judge.

COPY

FILED
JAN 6 1973
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972
No. 72-840

BYRON LIND,
Guardian ad litem of Jay S. Rogers, Incompetent,
Petitioner,
vs.
ROBERT F. HALE,
Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the District Court of Appeal
In and for the Second District of Florida

R. CLARK ROBINSON of HARRIS,
CLARK, GREEN, PIPER & ROBINSON
303 West Coast Title Building
St. Petersburg, Florida 33701
Attorneys for Respondent

WARREN A. GIBSON
RAYMOND A. GRAHAM
800 S. Orange Avenue
Sarasota, Florida 33577
Attorneys for Petitioners

CHARLES W. BURKE
Suite 416, First Federal Building
St. Petersburg, Florida 33701
Administrator and attorney for
Estate of Maxine C. Rogers, deceased

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

NO.

RESPONDENT'S BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

Respondent prays that the Petition for Writ of Certiorari applied for in this cause be denied.

JURISDICTION

Petitioners have failed to comply with Rule 23 1.(f) of the Supreme Court rules inasmuch as they have failed timely and properly to raise and preserve any federal question for review by their Petition for Writ of Certiorari to this Honorable Court.

STATEMENT OF CASE

Respondent basically agrees with the statement of case as presented by Petitioners and would note only one additional matter; that, in fact, Charles W. Burke also appeared as counsel of record for Jay S. Rogers.

ARGUMENT

Respondent would show that this is not a proper matter for review by this court because:

I. No federal question exists as Jay S. Rogers was not deprived of due process of law during the proceedings in this cause.

II. The federal question of denial of due process of law to Petitioner was not properly raised and preserved for review by this Court.

I.

It is contended by counsel for Petitioners that Jay S. Rogers was denied due process of law because he was not represented at pretrial conference held on May 5, 1971, nor represented at the trial on May 11, 12, 13 and 14, 1971.

However, the record is clear that not only did Charles W. Burke represent Hazel Huff Rogers, the mother of the decedent, and, ultimately, the personal representative of her estate, who was Gail Rogers, Petitioner's son, as well as appearing as attorney for the Estate of Maxine C. Rogers and as personal representative for that estate, but he likewise represented Jay S. Rogers at the pretrial conference and during the time of trial.

This fact is made apparent by the Notice of Withdrawal of Counsel filed by Charles W. Burke on July 2, 1971, see Appendix "A"; and by the order of the trial court appointing Warren W. Gibson and Raymond A. Graham, as attorneys on behalf of Petitioners, dated July 1, 1971, see Appendix "B".

All parties material hereto were given Notice of Pretrial Conference and Notice of Trial on April 16, 1971, see Appendix "C".

According to Petitioners' Appendix E-1,

Report of Referee, incompetency hearing was not held until May 4, 1971, at which time no written order was filed either declaring Jay S. Rogers incompetent or appointing a guardian. Indeed, it was not entered until June 29, 1971, when the appropriate Ohio state court entered its Journal Entry and appointed Byron D. Lind, the son-in-law of Jay S. Rogers, as his guardian. It should be noted that this was done just one day before the petition to vacate judgment was entered in the trial court, Petitioners' Appendix "F".

The form of the Journal Entry is also somewhat unusual, as it attempts to make the declaration of incompetency of Jay S. Rogers retroactive to May 4, 1971, see Appendix "D".

Even discounting all of the family inter-relationships involved and the somewhat unorthodox order entered in regard to the incompetency of Jay S. Rogers, it is obvious from the record that

Jay S. Rogers was represented by counsel of record, Charles W. Burke, at all pertinent times throughout the litigation. Therefore, to state that he was denied due process of law is incomprehensible.

II.

The only mention made of a federal question, i.e., the denial of due process of law of one, Jay S. Rogers, was raised in a petition to the trial court to vacate the court's final judgment declaring Robert F. Hale to be the common-law husband of Maxine C. Rogers, deceased, see Petitioners' Appendix "F". Said petition contains over fifteen counts, only one of which even mentions a federal question.

It was the first time in which it was suggested to the trial court or to counsel of record that Jay S. Rogers had been adjudged incompetent and that anyone other than Gail Rogers had been appointed as guardian.

This was the last time that a Florida court

was to see mention of a federal question. There was no mention made of denial of due process in the assignments of error duly presented to the District Court of Appeal, Second District of Florida, on behalf of the Petitioners nor was there any mention of lack of due process of law to the Supreme Court of the State of Florida when their Petition for Writ of Certiorari was denied on September 19, 1972.

Therefore, the appeal courts of the State of Florida were never called upon by the Petitioners to pass upon the federal question which they are now attempting to have this Honorable Court review.

Respondent believes that, if indeed a federal question was raised by one of Petitioners' counts in their petition to vacate submitted to the trial court, their failure to assign said question as error to the appellate courts of the State of Florida should be deemed a waiver of the question. Beck v. Washington (1962) 82 S.Ct. 955; 369 U.S. 541; 8 L.Ed.2d 98.

The timeliness with which the federal question is to be raised in the state court is critical. This is largely a matter for the state to regulate by its procedural rules. Failure to raise the question at the stage of the proceedings required by state law will preclude review. Edelman v. California (1953) 73 S.Ct. 293; 344 U.S. 357; 97 L.Ed. 387.

Procedurally, the State of Florida provides that, before the Florida Supreme Court will take jurisdiction of a case on the ground that a final judgment or decree has construed a Florida or federal constitutional provision, at least four prerequisites must exist.

1. The question must have been raised at the first opportunity;

2. The constitutional provision claimed to be violated must have been designated specifically either by explicit reference to the article and section or by quotations of the provision itself;

3. The facts showing a violation must have been stated; and

4. The constitutional question must have been preserved throughout.

Hall v. Strickland (1965 Fla.) 170 So2d 827; International Hod Carrier v. Heffler Const. Co. (1959 Fla.) 112 So2d 848.

It is evident from the entire record of the proceedings that these four prerequisites for judicial review have not been complied with in this case.

Wherefore, Respondent respectfully requests this court to enter its order denying the Petition for Writ of Certiorari.

Respectfully submitted,

R. CLARK ROBINSON
HARRIS, CLARK, GREEN, PIPER & ROBINSON
Attorneys for Respondent

APPENDIX A

IN THE COUNTY JUDGE'S COURT PINELLAS COUNTY FLORIDA

FILE NO. 61,962

IN RE: ESTATE OF)
MAXINE C. ROGERS) NOTICE OF WITHDRAWAL OF COUNSEL
DECEASED.)

TO: GAIL ROGERS as Executor of the Estate of Hazel Hoff Rogers, Deceased, JAY S. ROGERS, and BYRON LIND as Guardian ad litem for Jay S. Rogers, Incompetent
c/o Graham and Gibson
Attorneys at Law
800 S. Orange Avenue
Sarasota, Florida

ROBERT F. HALE
c/o R. Clark Robinson, Esquire
Harris, Clark, Green, Piper & Robinson
303 West Coast Title Building
St. Petersburg, Florida 33701

Please be advised that, pursuant to the order of the Honorable David Seth Walker, County Judge, entered the 1st day of July, 1971, I hereby withdraw as counsel of record for Gail Rogers as Executor of the Estate of Hazel Hoff Rogers, deceased, and for Jay S. Rogers, and for Byron Lind as Guardian ad litem for Jay S. Rogers, Incompetent.

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true copy of the foregoing Notice of Withdrawal of Counsel has been served upon the individuals named above at the addresses indicated by regular United States mail this 2nd day of July, 1971.

/S/ Charles W. Burke
CHARLES W. BURKE
Attorney at Law
416 First Federal Building
St. Petersburg, Fla. 33701

APPENDIX B

IN THE COUNTY JUDGE'S COURT, PINELLAS COUNTY, FLA.

FILE NO. 61-692

IN RE: ESTATE OF)

MAXINE C. ROGERS)

DECEASED)

ORDER

This cause was heard on July 1, 1971, upon the Petition of Gail Rogers, Executor and Byron Lind, Guardian to substitute Byron Lind, Guardian of Jay S. Rogers, incompetent as a party in this cause in his representative capacity as guardian of Jay S. Rogers, or in the alternative to appoint a Guardian ad litem for the said incompetent and to substitute Warren W. Gibson and Ray Graham in lieu of Charles W. Burke as attorneys of record in this cause for Gail Rogers, Executor, Jay S. Rogers and his Guardian or Guardian ad litem.

It appearing that Jay S. Rogers has been duly adjudicated non compos mentis by the Summit County, Ohio Probate Court, that being the place of his domicile, that Byron Lind has been duly appointed qualified as the Ohio Guardian of the said Jay S. Rogers, incompetent, and that Charles W. Burke is desirous of withdrawing as attorney of record and Warren W. Gibson and Ray Graham are desirous of appearing as attorneys of record for the aforementioned Executor, for Jay S. Rogers, incompetent and his Guardian and Guardian ad litem, it is therefore,

ORDERED and ADJUDGED:

1. Byron Lind is appointed as Guardian ad litem for Jay S. Rogers, incompetent and made a party to this cause in his representative capacity as Ohio Guardian of Jay S. Rogers and Guardian ad litem for Jay S. Rogers; oath of Guardian ad litem to be filed forthwith.

2. Charles W. Burke is permitted to withdraw as attorney of record for Gail Rogers, Executor of Hazel Huff Rogers and for Jay S. Rogers and his Guardians;

3. Warren W. Gibson and Ray Graham are hereby substituted as the attorneys of record for Gail Rogers, Executor of Hazel Huff Rogers, for Jay S. Rogers, incompetent and for Byron Lind as the foreign Guardian and Guardian ad litem of the said Jay S. Rogers.

DONE and ORDERED at St. Petersburg, Florida, on July 1, 1971.

/S/ David Seth Walker
COUNTY JUDGE

APPENDIX C

IN THE COUNTY JUDGE'S COURT PINELLAS COUNTY FLORIDA

Probate No. 61,962

IN RE ESTATE OF)

MAXINE C. ROGERS)

DECEASED)

NOTICE OF PRETRIAL CONFERENCE AND FINAL HEARING

TO:

Honorable Charles W. Burke
416 First Federal Building
St. Petersburg, Florida

Mr. Jay S. Rogers
824 Falls Avenue
Cuyahoga Falls, Ohio

Gail Rogers as Executor of
the Estate of Hazel Hoff
Rogers and Guardian of
Jay S. Rogers, 10462 Page
Road, Streetsboro, Ohio

Mr. Melvin Penn
702 Aberdeen Circle, Tampa,
Temple Terrace, Florida

You will please take notice that a pretrial conference in the above-styled matter has been scheduled for May 5, 1971, at 2:30 p.m., and the Final Hearing on Amended Petition for Revocation and Granting of Letters of Administration has been scheduled for May 11, 1971, beginning at the hour of 2:15 p.m., before the Honorable David S. Walker, County Judge, in Chambers, at the Judicial Building, St. Petersburg, Florida, or as soon thereafter as counsel may be heard.

YOU MAY GOVERN YOURSELVES ACCORDINGLY.

I HEREBY CERTIFY that copy of the foregoing Notice has been furnished to the above-named addressees this 16th day of April, 1971.

HARRIS, CLARK, GREEN, PIPER & ROBINSON

By: /S/ R. Clark Robinson
R. Clark Robinson
Suite 303 West Coast Building
St. Petersburg, Florida 33701
Attorneys for Petitioner

APPENDIX D

IN THE COURT OF COMMON PLEAS PROBATE DIVISION
SUMMIT COUNTY, OHIO

IN THE MATTER OF THE	)	CASE NO. 34,302
GUARDIANSHIP OF	)	Doc. 44, page 141
JAY S. ROGERS,	)	JUDGMENT ENTRY
as incompetent	)	Filed June 29, 1971

This cause came further on to be heard this 29th day of June, 1971, upon the oral application to the court to change the suggested guardian for said ward from Ardene R. Lind to Byron D. Lind.

For good cause shown, the court finds that it is to the best interest of said ward that the said Ardene R. Lind be not appointed and all parties in interest have agreed that the best interest of said ward would be served by appointing Byron D. Lind, son-in-law of said ward and husband of said Ardene R. Lind as such Guardian. It has been represented to the Court that said ward is permanently now living in the home of the said Byron D. Lind and that, as such Guardian, the said Byron D. Lind is well able to serve the best interest of said ward in maintaining his care and support and providing for his general welfare.

The Court had previously determined at the hearing on May 4, 1971, that the said Jay S. Rogers was an incompetent person by reason of advanced age and mental and physical infirmity and that a Guardian was necessary.

IT IS, THEREFORE, Ordered that the said Byron D. Lind may be forthwith appointed as such Guardian upon giving proper bond.

/S/ Nathan Koplin
JUDGE

APPROVED:

/S/ Robert H. McDowall
Robert H. McDowall, atty. for
First National Bank

/S/ Ward W. Davis
Ward W. Davis, atty. for
Byron D. Lind